LEONG YICK REALTY CO. SDN. BHD.

v.

ASIA COMMERCIAL FINANCE (M) BHD.

HIGH COURT, JOHOR BAHRU
TUAN HAIDAR BIN MOHD NOOR J.
[ORIGINATING SUMMONS NO. 563-92]
20 APRIL 1994

WINDING UP: Claim for monies owed under a charge - Chargee demanded payment through notice under s. 218 Companies Act 1965 - Whether issue thereof proper - Whether there was a debt within the meaning of s. 218 - Whether winding-up petition a legitimate means of enforcing payment of debt which is bona fide disputed - Whether recovery of such debt should proceed on a separate action.

In this case the plaintiff and one PTI entered into a sale and purchase agreement whereby the plaintiff agreed to sell to the latter 21 pieces of land in Mersing, Johor (the said land) for RM700,000. PTI later nominated its associate company, Bumi Armada Sdn. Bhd. (Armada), to effectuate the purchase. Armada subsequently obtained a loan of RM850,000 from the defendant and paid the plaintiff the balance purchase price. The facts showed that the said loan was given out upon the security of a third party charge created over the said land by the plaintiff. The terms of the charge *inter alia* stipulated that the plaintiff and Bumi Armada were co-extensively liable for the loan with the defendant having the first recourse against them individually or against both jointly and severally in the event of default.

Armada defaulted in payment and the said land was sold off pursuant to a foreclosure proceedings taken by the defendant. There was however a shortfall of RM566,277.73 in the proceeds of the sale compared to the amount of loan still due and the defendant henceforth issued the plaintiff with a notice under s. 218(1)(e) of the Companies Act and threatened the latter with a winding-up proceedings unless the said "debt" was paid. The plaintiff applied for an order to restrain the defendant from proceeding with the winding up petition on the grounds that the notice under s. 218 was misconceived as the plaintiff, having sold the said land to PTI, had no more interest in the same and that there was no debt owed by it to the defendant.

The issue was whether there was a debt from the plaintiff to the defendant within the meaning of s. 218(1)(e) of the Companies Act 1965, thereby enabling the defendant to get an order to wind up the plaintiff.

Held:

[1] It cannot be disputed that by the terms of the charge the defendant had a right to institute action against both the plaintiff and Bumi Armada or either of them. However a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed. Hence to recover the shortfall the defendant should proceed by way of a seperate action and not through s. 218 of the Companies Act.

[2] The failure by the plaintiff to respond to the notice of demand under s. 218 of the Companies Act 1965 or to pay the sum demanded therein, did not by itself constitute the plaintiff as a debtor and nor did it result, as between them, a creditor-debtor relationship within the meaning of that section. It is the presumption arising from such failure or neglect to meet the demand that gives rise to such situation and consequently gives the Court the jurisdiction to order that the company be wound up.

[3] The presumption under s. 218(2)(a) of the Act is rebuttable. In this case apart from the presumption stipulated therein, there is nothing else to suggest that the plaintiff is anything but solvent. In the circumstances it is not open for the defendant to contend that the shortfall arising out of the said foreclosure proceedings constituted a debt which entitled it to proceed with winding up proceedings.

[Plaintiff's application allowed].

Cases referred to:

Malaysian International Merchant Bankers Bhd v. G & C Securities Sdn. Bhd. & Anor [1988] 2 MLJ 471 ***(foll)***

Securicor (M) Sdn. Bhd. v. Universal Cars Sdn. Bhd. [1985] 1 MLJ 84 ***(refd)***

Kandiah Peter a/l Kandiah v. Public Bank Berhad [1993] 2 AMR 3464 ***(foll)***

Hongkong & Shanghai Banking Corporation Ltd. v. Wan Mohd. bin Wan Ngah [1991] 1 CLJ 821 ***(refd)***

Re Lympne Investments Ltd. [1972] 2 All ER 389 ***(refd)***

Re Nima Travel Sdn. Bhd. [1986] 2 MLJ 375 ***(refd)***

Chip Yew Brick Works Sdn. Bhd. v. Chang Heer Enterprise Sdn. Bhd. [1988] 2 MLJ 447 ***(dist)***

Legislation referred to:
Companies Act 1965, s. 218(1)(e), (2)(a)
National Land Code, 1965 s. 256

For the plaintiff - S. Gunapati; M/s Rozinah Nizarruddin, S. Gunapati & Co.
For the defendant - A. Navamani; M/s T.S. Chong & Co.

JUDGMENT

Haidar bin Mohd Noor J:
The plaintiff, Leong Yick Realty Co. Sdn. Bhd. filed this originating summons against the defendant, Asia Commercial Finance (M) Bhd. (encl. 3), seeking the following orders:

1. Asia Commercial Finance (M) Bhd. dalam tindakan ini disekat dan satu injunksi diberi untuk menyekat defendan daripada memfailkan petisyen penggulungan untuk menggulung Leong Yick Realty Co. Sdn. Bhd., plaintif di sini.
2. Asia Commercial Finance (M) Bhd., defendan di sini disekat dan satu injunksi diberi untuk menyekat defendan daripada mengiklankan petisyen penggulungan yang dimaksudkan terhadap Leong Yick Realty Co. Sdn. Bhd., plaintif di sini.
3. Relief selanjutnya atau yang lain.
4. Kos permohonan ini dibayar oleh defendan kepada plaintif.

This originating summons is supported by the affidavit of Mak Hin Kern, the director of the plaintiff, dated 20 August 1992 (encl. 2).

The defendant opposed this originating summons by way of the affidavit of Gan Lian Peng, a branch manager of the defendant, dated 20 October 1992 (encl. 4).

The filing of this originating summons by the plaintiff was prompted by the notice issued by the defendant under s. 218(1)(e) of the Companies Act, 1965 demanding that unless a sum of RM566,277.73 was paid to the defendant winding up proceedings would be instituted against the plaintiff (see pages 1 - 2 of the bundle of documents annexed to encl. 2). Upon receipt of the notice of winding up, the plaintiff by its solicitors wrote to Bumi Armada Navigation Sdn. Bhd. ('Bumi Armada'), the nominee of PTI Development and Construction Sdn. Bhd. ('PTI') that the plaintiff would be seeking indemnity against it. The plaintiff, however, did not proceed further as the defendant's action against Bumi Armada was then still pending (see paragraph 5 of the affidavit of Mark Hin Kern at encl. 5).

The issue of the purported debt owed to the defendant by the plaintiff is centred on a third party charge executed by the plaintiff in favour of the defendant. It would then be appropriate for me to set out the brief facts leading to the execution of the third party charge and the filing of this originating summons by the plaintiff.

On or about 18 October 1983 the plaintiff agreed to sell and PTI agreed to purchase twenty-one (21) pieces of lands situated in the Mukim of Mersing belonging to the plaintiff for a consideration of RM700,000. An agreement of sale and purchase was duly executed by the parties (see pages 3 - 8 of the bundle of documents annexed to encl. 2). According to the sale and purchase agreement the completion date is 21 December 1983. For reasons best known to the parties, PTI in June 1985 nominated its "associate company" Bumi Armada to act on its behalf in all financial transactions and had acquired a fixed loan from the defendant to settle the balance of the purchase price (see page 9 of the bundle of documents annexed to encl. 2). Bumi Armada confirmed this arrangement (see pages 10 and 11 of the bundle of documents to encl. 2).

Bumi Armada, PTI and the defendant arranged a third party charge to be created with the plaintiff's lands as security for a loan out of which the plaintiff would be paid the balance of the purchase price. Bumi Armada received the loan sum and a portion of it was paid to the plaintiff with the consent of Bumi Armada see page 12 of the bundle of documents to encl. 2). It would appear that the defendant and Bumi Armada apparently strong business relations for the defendant even agreed to waive personal guarantees from its directors (see page 13 of the bundle of documents attached to encl. 2). It is interesting to note that even though the price was tagged at RM700,000 the defendant was prepared to extend the loan to the tune of RM850,000!

Be that as it may, apparently Bumi Armada defaulted in repayments, and the defendant proceeded with the foreclosure proceedings on the third party charge by instituting originating summons No. 31-300 of 1986 in the High Court here. The defendant, it would appear, also took action against Bumi Armada vide Johor Bahru

High Court Suit No. 25-107/89. Legal action was also taken against Abdul Aziz bin Mokhtar, a director of Bumi Armada as the guarantor of the loan and judgment against him had been entered and he had been adjudicated a bankrupt by the High Court here on 23 March 1992 *vide* Bankruptcy No. 43-801/88 (see paragraph 15 of the affidavit of Gan Lian Peng in encl. 4). The plaintiff did not contest the foreclosure proceedings as apparently the lands had been sold and the loan was granted to enable completion of the sale to take place.

As a result of the sale of the lands as ordered by the Court in originating summons 31-300 of 1986 (see exhibit 'ACF-3') there is a shortfall of a sum of RM566,277.73. This is the sum that the defendant claimed is a debt due to it from the plaintiff. The plaintiff's contention is that the lands had been sold and the loan was granted to enable completion of the sale to take place. The plaintiff no longer has any interest in the lands. However, the defendant is relying, *inter alia*, on clause 14 in the annexture to the charge (exhibit 'ACF-1') which reads:

> 14. If the amount realised by the Chargee or the sale of the land under the provisions of the National Land Code after deduction and payment thereout from the proceeds of such sale of all fees, dues, costs, charges and other expenses is less than the amount due to the Chargee and whether at such sale the Chargee is the purchaser or otherwise the Chargor shall pay to the Chargee the difference between the amount due and the amount so realised and until payment will also pay interest on such balance at the ruling rate.

The defendant further relies on clause 19(b) of the annexture to the charge to support its claim of the liability of the plaintiff for the shortfall. Clause 19(b) reads:

> Though as between the borrower and the chargor the chargor is a surety only for the borrower yet as between the chargor and the chargee the chargor shall be a principal debtor and the said land shall be the principal security for the gums of money due under this charge and accordingly the chargor and the said land and every part thereof shall not be released at any time or by any indulgence given to the borrower or by any act matter or thing whereby the chargor as surety only on the said land and any part thereof might have been released and discharged **Provided Always** nothing herein shall prejudice the rights of the chargee from making a first recourse against the chargor the borrower or against both the chargor and the borrower jointly and severally before making recourse to the realisation of this security of the chargee at their sole discretion so deem fit.

It would appear therefore that the liability of the plaintiff and Bumi Armada is co-extensive, that is, the defendant has a first recourse against the plaintiff or Bumi Armada or against both jointly and severally before making recourse to the realisation of the security of the lands charged by way of third party charge.

The law

It is then pertinent for me to examine the issues before me and the laws applicable in so far as this originating summons of the plaintiff goes.

I do not think it can be disputed of the right of the defendant to institute actions against both the plaintiff and Bumi Armada or either one of them by virtue of clause 19(b)(see *Malaysian International Merchant Bankers Bhd. v. G & C Securities Sdn. Bhd. & Anor* [1988] 2 MLJ 471). However, the issue here in so far as the plaintiff is concerned is whether there is a debt due within the meaning of s. 218(1)(e) of the Companies Act 1965 in order to get an order of winding up of the plaintiff as the defendant intended to do in which the plaintiff presently is trying to prevent by this originating summons.

From the facts it would appear that the plaintiff did not respond to the notice of demand issued pursuant to s. 218 of the Companies Act 1965 other than writing to Bumi Armada intimating that the plaintiff would seek indemnity against it and the filing of this originating summons against the defendant. In the circumstances, would the failure to respond to the notice and/or to pay the sum as demanded constitute the plaintiff as a debtor or a creditor-debtor relationship results? It is to be noted that the presumption under s. 218(2)(a) of the Companies Act 1965 is rebuttable and in this respect V.C. George J. in *Securicor (M) Sdn. Bhd. v. Universal Cars Sdn. Bhd.* [1985] 1 MLJ 84 said:

> It is to be noted that it is not the neglect to meet the demand of the creditor that gives the jurisdiction to the Court to order that the company be wound up but the inability of the company to pay its debt. It is the presumption arising from the neglect to meet the demand that gives the Court the jurisdiction. This presumption is rebuttable.

Further, apart from the s. 218(2)(a) presumption there is nothing else to suggest that the plaintiff is anything but solvent.

The filing of this originating summons by the plaintiff-would indicate that the plaintiff is disputing the debt allegedly owing to the defendant.

The issue really is centred on whether there was a debt and if it is whether it is in dispute and there are grounds to support it. Our Supreme Court in dealing with the resulting order under s. 256 of the National Land Code 1965 in *Kandiah Peter a/l Kandiah v. Public Bank Berhad* [1993] 2 AMR 3464 stated at page 3468:

> A chargee who makes an application for an order of sale in foreclosure proceedings under s. 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. **The chargee, therefore, does not sue for a debt**. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. **The order for sale when made under s. 256 of the Code is not a judgment or a decree.**
> (emphasis added).

In the circumstances for the defendant to contend that the shortfall arising out of the foreclosure proceedings would constitute a debt in which the defendant is entitled to proceed for a winding up proceedings would not be correct.

In any event as the debt is disputed by the plaintiff, the defendant should proceed by way of a separate action against the plaintiff to recover for the shortfall. In fact the case of the *Hongkong & Shanghai Banking Corporation Limited v. Wan Mohd. bin Wan Ngah* [1991] 1 CLJ 821 relied on by Counsel for the defendant would seem to support that a separate action need to be taken against the plaintiff to recover the shortfall. The learned Judge said at page 824:

> If the amount realised from the sale is not sufficient to cover the amount due then it is implied that a separate action may be taken against the debtor-chargor to recover the balance should he fail to pay the chargee the difference.

In *Re Lympne Investments Ltd.* [1972] 2 All ER at page 389, Megarry J. stated:

> If there is liability, a failure to discharge that liability may well be 'neglect' whether it is due to inadvertence or obstinacy or dilatoriness; but a challenge to liability is a challenge to the foundation on which any contention of 'neglect' in relation to an obligation must rest.

In *Re Nima Travel Sdn. Bhd.* [1986] 2 MLJ at page 375, Shankar J. said:

> There is a plethora of authorities to the effect that a winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed by the company.

Further on the same page, His Lordship stated:

> The proper course of action for the plaintiff the moment they knew their claim was disputed, was to establish their debt by filing an action to have the matter adjudicated upon in the usual way.

The case of *Chip Yew Brick Works Sdn. Bhd. v. Chang Heer Enterprise Sdn. Bhd.* [1988] 2 MLJ 447 relied on by Counsel for the defendant is of no application as the respondent though disputing the appellant's claim, admitted that it owed the appellant a sum of RM60,580 and this sum according to the Supreme Court is substantial. The Supreme Court said at page 448:

> The amount of the admitted and unpaid debt is substantial, and it was almost half of the amount claimed by the appellant. Therefore the appellant should not be prevented from pursuing its petition so that the Court would be able to consider all evidence and determine whether it should exercise its discretion to order winding up or not to order.

On the facts and the authorities, I am of the view that this is a proper case where the Court should exercise its discretion in favour of the plaintiff. In the circumstances I make an order in terms of this originating summons.